No. 13,600

IN THE

United States Court of Appeals

For the Ninth Circuit

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO,
Appellant,

vs.

SCHENLEY INDUSTRIES, INC.,
Appellee.

CHARLES W. EBNOTHER, Trustee of the Estate of Hedgeside Distillery Corporation, Bankrupt.
Appellant,

vs.

SCHENLEY INDUSTRIES, INC., a corporation,
Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

PRELIMINARY STATEMENT.

Four years ago appellee Schenley Industries, Inc. (hereinafter called "Schenley"), filed a petition in reclamation in the District Court, seeking possession of its goods from a bankrupt warehouseman.

Schenley had bought and paid for the whiskey and spirits. They were stored in an Internal Revenue Bonded Warehouse licensed by the United States, and licensed by the State of California. Schenley paid the regular storage charges and held warehouse receipts for the goods. The warehouse receipts were duly issued and regular on their face. Schenley asked for its goods.

Some two years later, after testimony reported in 2,523 pages of transcript and after thousands of documents had been introduced into evidence, the case was finally submitted to the Referee in Bankruptcy. Some 9,000 barrels of whiskey and spirits were involved, and against them the appellant Anglo Bank and appellant Trustee in Bankruptcy made adverse claims which ran the gamut of legal theory. But diverse as the claims were, all had two things in common. They were technical to the point of hair-splitting. And they were *contrary to the facts.*

The Referee made an order granting the petition in reclamation, and made detailed Findings of Fact and Conclusions of Law. The United States District Court approved and adopted the Findings of Fact of the Referee, reviewed the applicable law, and promptly affirmed the Referee's order. In a superbly written and documented opinion, Hon. Dal M. Lemmon has disposed of the same contentions urged by appellants here.[1]

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[1]Appellants in listing the "pertinent portions" of the opinion seem to have omitted Section 5, Record pp. 82-94. It is decidedly "pertinent", although adverse to appellants.

Only part of the conflict in the lower Courts has been brought here on appeal.

The Bank has abandoned its original claim of ownership and now appears only as a creditor. The Trustee has abandoned all claim to half of the goods, so that some 4,484 barrels of spirits remain contested.

The Trustee has been unable to show any factual defect in Schenley's title, and has neither pleaded nor proved any actual fraud on creditors which would invalidate Schenley's purchases. The Trustee does urge the sole legal defense that the sales to Schenley were constructively fraudulent because of an asserted lack of change of possession. Simply stated, the contention poses but two main questions:

(1) Was Hedgeside a qualified and licensed warehouse authorized to issue warehouse receipts?

(2) When whiskey or spirits are sold, are the requirements of a change of possession met by a transfer into an Internal Revenue Bonded Warehouse?

The second is purely a legal question. It is undisputed that the goods here were transferred into a qualified and licensed Internal Revenue Bonded Warehouse. Judge Lemmon's opinion fully reviews the applicable law on this point. We can add little to that discussion except for a brief rebuttal to the Trustee's attempt to wriggle out of its coverage.

The first question is *not* purely legal. It is also factual. It has now been answered by two different

Courts, which made and adopted detailed findings of fact from the mountains of evidence. *But the facts found by the Courts below are not the "facts" recited by appellants to this Court.*

Appellants do *not* in their brief directly challenge the sufficiency of the evidence to support the Findings of Fact. Instead appellants simply ignore the Findings, state that "there is no dispute as to the operative facts,"[2] and blandly proceed to state the evidence most favorable to *appellants.*

We understand the rule to be that Findings of Fact of the District Court are presumptively correct and are not to be set aside unless clearly erroneous (*Goldstein v. Polakof,* CCA-9, 1943, 135 F.(2d) 45; *United States v. Foster,* CCA-9, 1941, 123 F.(2d) 32). The Findings here are not "clearly erroneous", nor erroneous at all. They are supported by the weight of the evidence. The Findings are also fatal to appellants' contentions.

Since appellants have not chosen to state the evidence fully and fairly, we will first state the facts as found by the Referee and by the District Court. We will then reply to the appellants' arguments in the order made.

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[2]App. Brief, p. 7.

II.

STATEMENT OF FACTS.

The 4,484 barrels of spirits in dispute were purchased by Schenley from Hedgeside Distillery in two different lots under separate contracts. The first 1,293 barrels were purchased under a production contract dated September 17, 1945, and the balance of 3,191 barrels under a production contract dated October 13, 1947.[3] For all purposes here, the contracts and performance under them were identical.

The contracts required Schenley to purchase and Hedgeside to sell a large share of Hedgeside's production of spirits. The contracts provided that Schenley would furnish the cooperage, would inspect and accept the spirits as produced, and would take title on delivery of warehouse receipts.

The contracts further provided "at our request you agree to store distilled spirits produced by you for us hereunder in your Internal Revenue Bonded Warehouse at Napa, California, to the extent of Ten Thousand (10,000) barrels, the total storage charge therefor to be Ten (10¢) cents per barrel per month, plus customary handling charges of Twenty-five (25¢) cents per barrel in and Twenty-five (25¢) cents out, we to furnish our own insurance * * *"[4]

Under these contract provisions a representative of Schenley was stationed at Hedgeside Distillery. He

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[3]Pet.'s Exhibits Nos. 15 and 22-B; Findings, R. 83.

[4]Pet.'s Exhibit No. 15, par. 7; the 1947 contract contained a similar provision, Pet.'s Exhibit No. 22-B, par. 10.

inspected and accepted spirits produced under the contracts. After his acceptance, the representative approved a Hedgeside invoice to be sent to Schenley for payment.[5]

Hedgeside thereupon billed Schenley and delivered warehouse receipts for the goods, placing the goods themselves in the Internal Revenue Bonded Warehouse on the premises. Schenley paid Hedgeside in full for all spirits so delivered under the contracts.[6] As appears from the testimony of Elouise Jones and Earl Johnson, Schenley was put to its proof on every barrel and every document. But when the long and involved testimony was over and the thousands of documents were in evidence, Schenley had proved that it purchased and paid for every barrel of spirits.[7]

Petitioner's Exhibits Numbers 52 and 53 are typical warehouse receipts and evidence of payment on these transactions.

It should be emphasized that *there is no evidence whatever of any factual defect in Schenley's title to the goods it purchased,* and the District Court so found.

All warehouse receipts held by Schenley were issued by Hedgeside as the proprietor of its Internal

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[5]*Walter Del Tredici,* R. pp. 197-264; *Findings,* R. p. 83.

[6]*Findings,* R. 82-83; *Earl Johnson,* R. pp. 311-480, 481-580; *Elouise Jones,* R. 581-854; 667-695.

[7]Many of the payments cleared through the very bank which appears here as an appellant, the bank holding the warehouse receipts for delivery to Schenley when payment was received at the bank (testimony of Elouise Jones).

Revenue Bonded Warehouse No. 2, located on the Hedgeside premises at Napa.

Hedgeside operated a distillery engaged in the manufacture of whiskey and spirits. Such goods by Federal law *must* be stored in bond within 72 hours of manufacture or the heavy tax levied by the United States, several times the value of the goods themselves, falls due at once.[8] Most distillers then also operate an Internal Revenue Bonded Warehouse where the goods can be stored for several years without payment of tax.[9]

It is undisputed that Hedgeside had both Federal and State licenses for its I.R.B.W. Treasury Department Form 27-D, when approved by the Alcohol Tax Unit of the Bureau of Internal Revenue, authorized Hedgeside to store spirits in bond in the warehouse without payment of tax.[10] The form itself contains a detailed description of the warehouse, which is inspected before approval of the permit.

Hedgeside also held a "Distilled Spirits Manufacturers" license and a "Public Warehouse" license from the State of California under the provisions of its Alcohol Beverage Control Act.[11] These licenses *specifically authorized* Hedgeside *to store* whiskey and spirits for other persons licensed to hold alcoholic

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[8]26 USCA Sec. 2800-B-2.

[9]As counsel for the Trustee put it, "Now, you know as a matter of fact, do you not, Mr. Johnson, *that every distillery is required to have a bonded warehouse on its premises?* (p. 491, lines 21-23, orig. Rep. Tr.)

[10]Pet.'s Exhibit No. 47.

[11]Pet.'s Exhibits Nos. 60, 61, 62.

beverages in bulk, and to issue *warehouse receipts* for them. (Secs. 6 (L), 6 (M), 6 (K), *Deering's California General Laws,* Act 3796.)

Over a period of years Hedgeside stored goods for various persons and firms licensed to deal in bulk whiskey and spirits, although, of course, it could not and did not store for the general public.[12] A charge was made for storage and handling of the goods.

The storage charge to Schenley, as provided in its production contract for large-scale storage, was 10¢ per barrel per month.[13] The warehouse receipt books show that a similar charge was made to Barnhill Distilleries, which also purchased large quantities for storage. In other cases, including storage of Schenley's goods which were not purchased under production contract, the storage charge was 20¢ per barrel.[14] The in-and-out handling charge in all cases was 25¢ per barrel.

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[12]As a review of its warehouse receipt books indicates, Pet.'s Exhibits Nos. 1, 2, 3, 4, 5, 59, these storage customers included Wm. Lewis & Co., Larkmead Vineyards, Bank of America, E. Martinoni Co., Joseph Abrams Co., Silverado Grape Growers Coop., Irving M. Jacobs, Mohawk Liquor Co., Beaulieu Vineyards, Glaser Bros., Napa Valley Winery, National Liquor Stores, Frank Pastori, Schenley, Anglo Bank, American Trust Co., and Barnhill Distilleries.

[13]Pet.'s Exhibit No. 52; Pet.'s Exhibit No. 15, paragraph 7, production contract.

[14]For example, in Pet.'s Exhibit No. 2 are a large number of warehouse receipts to Schenley, beginning with No. 3152-B, in which the storage charge is 20¢ per barrel. Pet.'s Exhibit No. 3, receipt No. 3201-B is similar. In Pet.'s Exhibit No. 59, a charge of 20¢ per barrel was made to Beaulieu Vineyards, Mohawk Liquor, Barnhill Distilleries, and Larkmead Vineyards (see warehouse receipt Nos. 3483-B, 3663-B, 3666-B, 3668-B, 3688-B, 3542-B, 3526-B, 3527-B).

The bonded warehouse of Hedgeside was located in the country just outside of Napa, California. Directly adjacent to the two large storage buildings of I.R.B.W. No. 2 is a small office building.[15] Both the distillery office and the warehouse office were located in this office building. The office of the U. S. Government Gauger, who was required to keep the storage buildings securely locked at all times, was also located in the same office building, and was described in Hedgeside's Federal Permit, Form 27-D, as "on the bonded premises".[16]

The warehouse receipt books were kept in a small room off the main office in a steel vault. When a warehouse receipt was issued by Hedgeside, two copies were made out at the same time and the copies kept with the warehouse receipt book in the vault.[17] The warehouse receipt books, together with the copies, were found in the vault by the Trustee when he took over the premises.[18]

Schenley held and still holds the original Hedgeside warehouse receipts for the spirits. It paid storage on the spirits to Hedgeside, and paid storage to the Trustee. The receipts are regular on their face and recite the serial numbers of the barrels of spirits purchased by Schenley.

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[15]See Pet.'s Exhibit No. 69, sketch of the premises.
[16]Pet.'s Exhibits Nos. 47, 69; R. pp. 710-720.
[17]R. pp. 710-11, 759, 805-806, et seq.
[18]R. pp. 590-91.

From these facts and others,[19] the Referee and the District Court made Findings of Fact that:

(1) Schenley purchased the spirits for value from the owner of the spirits.

(2) At all times Schenley held Hedgeside warehouse receipts for the spirits.

(3) Hedgeside held Federal and State licenses authorizing it to store spirits for persons licensed to deal in bulk spirits, and authorizing it to issue warehouse receipts for that storage.

(4) Hedgeside charged a reasonable rate in the regular course of business for such storage.

(5) At all times copies of the warehouse receipts were kept at the principal place of business of Hedgeside and at the warehouse.

The Courts below concluded that a bona fide purchaser holding warehouse receipts from a warehouseman was entitled to the possession of his goods.

We think that the Findings of Fact are correct and supported by an abundance of evidence. Appellants ask this Court to overturn them on the basis of arguments, asserted inferences, and claims of "undisputed evidence" which is in fact disputed or irrele-

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[19]Appellants did not choose to make the entire record below part of the printed record on appeal. Should the Findings of Fact be challenged by appellants, the Court is asked to review the evidence *without all of the evidence before it.* This Court has stated that it will not go behind the Findings with such a record. (*United States v. Foster,* 123 F. (2d) 32.) The Eighth Circuit has ruled likewise. (*Sublette et al. v. Servel,* 124 F. (2d) 516.)

vant. These same arguments *on the evidence* have twice been submitted to the trier of facts and found lacking in merit.

We will again point out their lack of merit in replying to appellants' contentions.

III.

ARGUMENT.

A. HEDGESIDE WAS A WAREHOUSEMAN AS DEFINED BY THE WAREHOUSE RECEIPTS ACT.

As a preliminary matter, there seems to be no point in debating with appellants at this point in the proceedings on petitioner's "burden of proof", which has been met, or in a claimed "presumption of ownership" arising out of possession by the bankrupt warehouseman. (Appellants' Brief, pp. 11-12.) Those are matters for the trial Court, and neither Hedgeside nor the Trustee in its shoes has made any claim of *ownership.* Any presumptions on this appeal are in support of the judgment, not against it.

Appellant's arguments fall into three main categories, and we will answer them in like manner.

(1) Copies of warehouse receipts were kept at the warehouse.

Appellants concede that copies of warehouse receipts were kept at Hedgeside's principal place of business, but contended that there was no "satisfying evidence" that copies of the warehouse receipts were kept "at the warehouse". This argument is based upon the assump-

tion that the statute requires copies to be kept *inside* the locked warehouse (where no one could inspect them), rather than *at* the warehouse, i.e., in the adjacent warehouse office along with the business records of the I.R.B.W.

The opinion of the District Court on this point reads as follows (R. pp. 123-4):

> "The Referee found as a fact that at all times copies of warehouse receipts issued by Hedgeside, covering whiskey and spirits stored in No. 2, 'were kept at said principal place of business' and 'at said warehouse'.
>
> "Hedgeside had two warehouses that made up No. 2. The Hedgeside office and the storekeeper-gauger's office were in a third building. The receipts were made out in triplicate, and the receipt books were stored in a vault in 'a little extra room off of the main office'. The space between the building where the office is and 'where the warehouse starts' is 'a truck and a half'.
>
> "Apparently because the copies of the Warehouse receipts were not kept in the warehouse building itself, the Trustee argues that copies were not kept 'at the warehouse'.
>
> "This Court is not impressed with such hair-splitting. Section 3440.5 requires that 'Such copy shall be open to inspection upon written order of the owner or lawful holder of such receipt'. Obviously, a person presenting such an authorization would go to the office building—not to the warehouse structure itself, which Federal law requires shall be 'kept securely locked, and shall at no time be unlocked or opened or remain open except in

> the presence of such storekeeper-gauger or other person who may be designated to act for him'. 26 USCA section 2872.
>
> "But perhaps 'We must speak by the card, or equivocation will undo us.'
>
> "Fernald's 'Connectives of English Speech,' at page 55, has the following:
>
> > 'At is less definite than in. At the church may mean in, or near the church.'
>
> "The Court holds that copies of Schenley's warehouse receipts were kept at No. 2, as required by Section 3440.5."

As the District Court indicated, the very *purpose* of the statutory language is to make the copies available for inspection. They cannot be inspected in a locked storage building. A warehouse is not a self-operating vending machine, it requires an office of some kind. A "warehouse", on the common sense of it, includes the *storage* buildings and the *office for those buildings.* A copy here was kept in that warehouse office.

We can only add the definition contained in Webster's New International Dictionary, Unabridged Second Edition, to show that the legislature meant to and did use the word it wanted:

> "AT—primarily *at* expresses the relation of presence or contact in space or time, or of direction toward. It has much the sense of *to* without its implication of motion, and is less definite than in, on, by, etc. Thus *at* the house may be in or *near the house.* When reference to the interior

> of any place is made prominent, *in* is used; when a *place* is regarded as a mere local point, *at* is more commonly employed."

The finding that copies of warehouse receipts were kept at the warehouse is supported by the evidence, and is correct.

(2) Hedgeside was "lawfully" engaged in storing.

Here appellants say that Schenley "failed to produce satisfactory evidence * * * that Hedgeside was *lawfully* engaged in storing" (Brief, p. 12). Apparently this is because Hedgeside "did not file its storage rates with the California Public Utilities Commission" (Brief, p. 13). Appellants do not, of course, point out how or why Hedgeside could or should so file its rates, or that the Public Utilities Commission required it to do so. By the same token Hedgeside did not file rates with the Interstate Commerce Commission, the FCC, FTC, or a number of other regulatory bodies.

The Court will note that the opinion of the District Court does not discuss this point. That is so because it was raised before the Referee, the law was briefed and the Referee was not impressed with appellants' argument. It therefore *was not* brought to the attention of the District Court either at oral argument or in the briefs. It is here resurrected by innuendo.

Hedgeside was not a *public utility*. It did not solicit storage from the general public, nor hold itself out as willing to serve the public. It did store bulk spirits

under *licenses from the Federal Government and the State of California which expressly authorized it to do so and to issue warehouse receipts.* Since it was not a public utility it did not file rates with that Commission, nor have appellants ever produced any evidence that the Commission required such filing.[20]

Hedgeside had all of the licenses required of it. The Courts below found that Hedgeside was "lawfully" operating a warehouse. There is no evidence to the contrary.

(3) Hedgeside was engaged in the business of storing goods for profit.

The evidence shows that Hedgeside stored goods for others at a regular rate of compensation. Appellants

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[20]The California Public Utilities Commission is charged with enforcing its own requirements; presumably it would have demanded that Hedgeside comply had those requirements applied. Appellants returned from the Commission empty handed in a search for evidence of such a demand. The reason for this is clear. The California Public Utilities Act (Deering's General Laws, Vol. 2, Act 6386) first includes the term "warehouseman" in its definition of "public utility". But Section 2½ then defines what is meant by such a public utility warehouseman, as follows: "*Warehouseman defined.* The term 'warehouseman' when used in this Act, includes every person, corporation * * * owning, controlling, operating or managing any building, or structure, or warehouse in which merchandise * * * *is regularly stored for the public generally* * * *" In line with this definition the California Supreme Court has held that to be a public utility a business must be *dedicated to the public use,* requiring a general offer of services to the public at large. (*Allen v. Railroad Commission,* 149 Cal. 78, 89; *Story v. Richardson,* 186 Cal. 162, 167.) The California Commission has therefore repeatedly ruled that warehouses which did not hold themselves out to serve nor serve the general public, were *not* public utilities and were *not* required to file their rates. (*L.A. Warehousemen's Assoc. v. Dohrmann,* 37 Cal. Rail Comm. 525, 526; *L.A. Warehousemen's Assoc. v. Lyons,* 37 C.R.C. 133; *Case No. 4090,* 40 C.R.C. 107.)

contend that the storage was not "for profit". The Referee and the District Court found that the contention was not supported by the evidence, nor by legal authority.

As the District Court stated, "The products of a distillery, when 'removed from the place where they were distilled and not deposited in a bonded warehouse as required by law', are subject to a tax amounting to several times their value and collectible 'immediately'. 26 USCA Section 2800(b)(2). Many distillers operate an Internal Revenue Bonded Warehouse, where the merchandise can be stored for eight years without payment of a tax. See 26 USCA Sections 2872 and 2879(b)." (R. 117.) The District Court went on to note that Hedgeside held State and Federal permits and licenses to engage in business as a bonded warehouse, to manufacture distilled spirits, and to conduct a "public warehouse".

With a bonded warehouse on its premises, and with the necessary permits and licenses, Hedgeside could store its own production in bond, and also store in bond for qualified licensees. It chose to utilize its warehouse, where space was available, for additional revenue.

Hedgeside charged a regular rate for storage and other handling charges. The storage rate was either 10¢ or 20¢ per barrel per month, and 25¢ in-and-out charge. In the case of Schenley, Hedgeside was obligated by its production contract to store up to 10,000 barrels at the 10¢ storage rate, and did so. This was

large volume storage. In other cases, including storage for Schenley which was not under contract, Hedgeside charged 20¢ per barrel per month. The storage customers included a variety of persons and firms, many of whom paid the 20¢ rate.[21]

The warehouse was managed as one part of the Hedgeside Corporation. There was no evidence introduced by appellants to show that this portion of the business operated at a loss, and no evidence whatever concerning the costs and expenses of the warehouse.[22] Schenley did introduce evidence of a regular storage rate, showing that the warehouse was operated for hire. Hedgeside received substantial revenue from its storage.

As against this evidence which supports the Findings of Fact, appellants make several statements of what they claim to be "uncontradicted evidence".[23] Appellants are mistaken.

Two of these statements (Numbers 1 and 5) we have already dissipated. The fact that Hedgeside did not advertise to the general public, was not a public utility, and therefore was not required to file rates as a public utility with the California Public Utilities Commission, is of no moment here. We are concerned

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[21]Some of the storage customers and references to warehouse receipts are listed in footnotes 12 and 14, supra, Statement of Facts.

[22]To follow appellants' argument here, Schenley should have had a C.P.A. audit the books of account of Hedgeside to make sure Hedgeside was not operating at a loss, lest the warehouse receipts be declared invalid.

[23]Appellants' Brief, pp. 12-13.

here with the application of the Uniform Warehouse Receipts Act, not the Public Utilities Act. As the Courts have pointed out, the Uniform Act does not depend on other regulatory statutes enacted for other purposes.[24]

Next appellants assert that Hedgeside charged rates less than 50% of those charged by certain public utilities (Number 6). In the first place *the assertion is erroneous.* As we have pointed out previously, the record shows that Hedgeside's rates to Schenley under production contract, and to Barnhill under similar circumstances, were 10¢ per barrel for the storage of thousands of barrels. The record also shows storage for smaller customers at *20¢ per barrel per month.* Appellants' Exhibit 35, the schedule of rates for metropolitan public utilities, shows a rate of *20¢ per barrel per month* for a 55-gallon barrel, the size used by Hedgeside.

In addition, appellants did not enlighten the lower Courts nor this Court as to how a comparison in rates between Hedgeside and public utilities in San Francisco and Stockton, not operated with a distillery, could be made. This Court instead is asked to *assume* a similarity in operation, and then to make a factual finding, contrary to the finding of the trial Courts,

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[24] "The Uniform Warehouse Receipts Act defines and fixes the rights and liabilities of the parties storing the grain, and is a full and complete treatise on the subject, *and makes no distinction between public and private warehouses or between bonded or unbonded warehouses, but regulates the storage of goods.*" (*Joy v. Farmer's Nat. Bank,* 11 Pac. (2d) 1074, 1075.)

that Hedgeside could not under any circumstances make money from storing goods.[25] We think that this is asking too much of the doctrine of judicial notice.

The last assertion of "uncontradicted evidence" claims that Hedgeside did not attempt to fix rates which could show a profit, and refused to store for anyone who did not have a production or bottling contract with it (Numbers 2, 3, 4). This is based *solely on the testimony of appellants' witness Logan,* the sales manager and an officer and director, who soon proved that he knew little or nothing about this phase of the business.

Logan stated that he reported to Stone, the President of Hedgeside and owner of substantially all of its stock (R. 860). *Stone* handled purchases (R. 861), negotiated the production contracts (R. 863), determined where to warehouse it (R. 863), and set the storage rates (R. 867). Logan then testified that *Stone* had made no estimate of whether or not the rates would return a profit when *Stone set the rates* (R. 878). It is apparent that this was an *opinion* of Logan's as to what *Stone intended.* The worth of

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[25]It should be noted that respondent Bank's Exhibit No. 35 was received into evidence over objection, with *no foundation whatever* of a similarity of rents, wages, overhead, etc. between metropolitan San Francisco and the countryside outside Napa. Further, no background of *bulk storage of spirits,* as done by Hedgeside, was shown for the public utilities which store anything for anybody in any quantity. (R. 942-3.) The record can be searched in vain for evidence of any similarity of operation. The result is akin to comparing the prices of a wholesale grocery in the country with a retail drug store in San Francisco. The Referee and District Court considered the tariff for public utilities. It is apparent from the Findings that the trial Courts did not consider it helpful.

Logan's opinions are painfully evident upon reviewing his testimony. Logan was a dummy director and officer who was entirely excluded from management by Stone, and consequently knew very little of even Hedgeside's most important transactions, let alone Stone's intentions.[26]

All of this evidence and testimony was before the Referee and the District Court. The evidence upon which appellants rely was *not* "uncontradicted". The trial Courts found as a fact that Hedgeside operated a warehouse business "for profit". Appellants now ask this Court to upset that finding of fact of the trial Court on the basis of Logan's testimony alone, and in utter disregard of all of the other evidence on the point. As this Court has stated, the findings of fact are not to be so lightly disregarded. (*Goldstein v. Polakof,* 135 Fed.(2d) 45.)

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[26]For example, Logan testified that:

(1) Hedgeside did not store goods in the Franciscan bonded warehouse. (R. 860, 870.)

(But Hedgeside did. (Findings, R. 19-20.))

(2) He knew of only one case where Hedgeside stored for a person without a production or bottling contract. (R. 873-4.)

(The evidence shows at least 15 other persons had goods in storage at Hedgeside, and there is no evidence whatever that any except Schenley and Barnhill had a production or bottling contract with Hedgeside. (Footnotes 12 and 14, supra.))

(3) He knew of the Hedgeside-Schenley production contracts only by "hearsay", having been told of them by "Stone or someone else". (R. 908.)

(The contracts called for the sale of a large share of Hedgeside's production of spirits (Pet.'s Exhibits Nos. 15 and 22), and Logan was the *sales manager.*)

(4) Stone *never consulted him* regarding the financial condition of Hedgeside. (R. 927.)

(5) He signed warehouse receipts for Stone without knowing anything about the transaction. (R. 909-10.)

If it is assumed that the phrase "for profit" were used in the Uniform Act in the technical sense of excess of receipts over expenditures, as contended by appellants, we are satisfied that the evidence clearly shows that Hedgeside intended to make money on its storage. For all that the record shows it did. The findings in that regard are correct.

But according to the cases interpreting the Uniform Act, the phrase "for profit" is *not* used in the sense advocated by appellants, and *no case involving a warehouse or the Uniform Act has been cited by appellants to support their argument.*[27] "For profit" in the Uniform Act means *"for compensation"* or *"for hire"*, and is nothing more or less than a codification of the common law distinction between a *gratuitous* bailee and a *bailee for hire.*

The opinion of the District Court correctly sets out the few cases in point as follows (pp. 119-122):

> "In support of his position, the Trustee cites two California decisions involving facts far different from those before this Court, and containing language inferentially *adverse* to the Trustee's contention.
>
> "One case is that of Sinsheimer v. Whitely, 111 Cal. 378, 380 (1896), decided long before the passage of the California Warehouse Receipts Act. There no storage whatever was charged. In the course of its opinion, however, the Court used the following language:

[27]Appellants now cite for the first time two *tax cases* which have nothing whatever to do with the Uniform Warehouse Receipts Act or warehouses. (Appellants' Brief, pp. 14-15.)

" 'A warehouse receipt has been defined to be a written contract between the owner of the goods and the warehouseman, the latter to store the goods and the former *to pay for that service.* (Hale v. Milwaukee Dock Co., 29 Wis. 488; 9 Am. Rep. 603) * * * But it is said that the tickets were the only vouchers issued by the defendant company, and hence must be treated as warehouse receipts. Rather, it seems to us, that circumstance tends to show that said company was not a warehouseman at all in the sense which the law attributes to that term—*an inference corroborated by the fact that it makes no charge for storage.* It is only persons who pursue the calling of warehouseman—that is, receive and store goods in a warehouse as a business *for profit*—that have power to issue a technical warehouse receipt, the transfer of which is a good delivery of the goods represented by it. (Shepardson v. Cary, 29 Wis. 42; Bucher v. Commonwealth, 103 Pa. St. 534; Edwards on Bailments, sec. 332)'. (Emphasis supplied.)

"From the foregoing, it will be seen that the expressions 'to pay for that service', 'charge for storage', and 'for profit' are used interchangeably.

"The other case, Harry Hall & Co. v. Consolidated Packing Company, 55 C.A. 2d 651, 654 (1942), likewise was one in which no storage was charged. As to the point now under discussion, the Court merely said, citing the Sinsheimer case, supra:

" 'In the present case defendant was not a public or a private "warehouseman" * * *, nor was it to receive *compensation* for the storage.'

"It is difficult to see how the Trustee or the Bank can derive comfort from either of these California cases. They simply are not in point.

"In Fidelity & Deposit Co. v. State of Montana, 9 Cir., 92 F. 2d 693, 696 (1937), the Court said:

" 'That Chatterton & Son was a public warehouseman within the general meaning of the term is not questioned. A storage and handling charge was regularly exacted from all those using the warehouse facilities and negotiable warehouse receipts were uniformly issued. 67 C.J. 443.'

"Section 57 of the Warehouse Receipts Act—a section that seems to have escaped the notice of counsel—provides:

" 'Interpretation of act. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.'[6]

"Since the 'law of those states which enact it' includes not only state statutes but also judicial decisions interpreting those statutes, the opinions of state judges in other commonwealths will be helpful here.

"In New Jersey Title Guaranty & Trust Co. v. Rector, 75 A. 931, 932-933 (1910), the New Jersey Court of Errors and Appeals—the highest in the

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"[6]See also the cases referred to in Subsection (a) of Section 13 of this opinion."

State—construed this identical Section 58 as follows:

> " 'Section 58 declares "warehouseman" to mean a person lawfully engaged in the business of storing goods *for profit,* and the bill of complaint alleges that the complainant is conducting the business of running safe deposit vaults, and warehousing valuable goods and chattels *for hire,* which sufficiently describes "warehouseman" as defined by the act, * * *' (Emphasis supplied.)

"The Uniform Warehouse Receipts Law was construed by the same Court in New Jersey Manufacturer's Association Fire Insurance Company v. Galowitz, 150 A. 408, 409 (1930). There the Court remarked:

> " 'The legal concept of the action comes within the general subject of bailee for hire. The automobiles were stored *at a price* in defendant's garage. The principle of liability is that of a warehouseman.' (Emphasis supplied.)

"In E. V. Webb & Co. v. Friedberg, N.C., 126 S.E. 508, 509 (1925), the Supreme Court of North Carolina implied that the mere fact that a receipt gives the 'storage rates' indicates that the goods are stored 'for profit'. The Court said:

> " 'If the concern is engaged in the business and goods are stored *for profit,* the statute applies. It matters not if the concern stores its own and also the goods of others (as was done by Hedgeside). The receipt issued terms itself "warehouse receipt" and *shows on the face that the goods are stored for profit; it gives the "storage rates".*' (Emphasis supplied.)

> "This Court holds that Hedgeside was engaged in the business of storing goods for profit, within the meaning of the California Warehouse Receipts Act."

We may add the definition of warehouseman contained in 56 American Jurisprudence, Sec. 2, page 320:

> "*Section 2. Definition*—A warehouseman in the general acceptance of the term is one who receives and stores goods for others as a business, and for a *compensation or profit.*"

As in other aspects of this proceeding, appellants find great fault with the cases which the District Court found to be controlling, but cite *no case* themselves concerning warehousing which even remotely supports their contentions. Appellants say that the following cases cited in the opinion of the District Court are "not in point":

In *New Jersey Title Guaranty & Trust Co. v. Rector,* 75 Atl. 931, 932-3, the question was whether or not the bank as a *warehouseman under the Uniform Act* could interplead rival claimants, where the complaint alleged a storing *for hire.*

In *New Jersey Mfg. Assn. Fire Insurance Company v. Galowitz,* 150 Atl. 408, 409, the question was whether or not a garageman storing cars *at a price* was a *warehouseman* under the Uniform Act.

In *E. V. Webb & Co. v. Friedberg,* 126 S.E. 508, 509, the question was whether or not a tobacco com-

pany running a warehouse was a *warehouseman* under the Uniform Act, wherein the Court flatly stated that the *storage rates* recited on the fact of the receipts showed that the goods were stored *for profit.*

The two California cases are fully discussed in the opinion of the District Court. As the District Court stated, they were cited by *appellants,* and if they are in point at all, they are *adverse* to appellants' contentions.

As a factual matter the Referee and District Court found that Hedgeside in the regular course of business stored in bond for persons licensed to deal in bulk spirits, and charged a reasonable rate for the storage. The lower Courts also found that Hedgeside had all of the necessary Federal and State licenses, and found that at all times copies of warehouse receipts were kept at Hedgeside's principal place of business and at the warehouse. Those Courts therefore concluded that Hedgeside was a warehouseman under the Uniform Warehouse Receipts Act.

There is more than substantial evidence to support the Findings of Fact, and appellants have fallen far short of showing that the Findings are "clearly erroneous". Since Hedgeside was a warehouseman, the provisions of Civil Code 3440 have no bearing on goods represented by warehouse receipts. (*Heffron v. Bank of America,* CCA-9, 1940, 113 F.(2d) 231, and cases cited in the opinion of the District Court, R., pp. 115-117.)

The order below should be affirmed on this ground alone.

B. CIVIL CODE SEC. 3440 DOES NOT APPLY TO GOODS TRANSFERRED INTO STORAGE IN AN INTERNAL REVENUE BONDED WAREHOUSE.

This is, of course, a purely legal point, since it is undisputed that all of the spirits here were transferred into bond within 72 hours of their production.[28]

Both the Referee and the District Court concluded that storage of alcoholic products in an Internal Revenue Bonded Warehouse constitutes a change of possession under a Bulk Sales Law. They found the law well settled in that regard.

Appellants insist that the decisions on the point (all adverse to appellants' contentions) are based on "local law" and that "California law" somehow is completely different. The opinion of the District Court disposes of the same arguments and cases presented by appellants in their brief:

> "Because of the Government's tight control over distilleries, it is well settled that storage of alcoholic products in an Internal Revenue Bonded Warehouse constitutes a sufficient change of possession under the Bulk Sales Law.
>
> "Not only, as we have seen, are distilled spirits immediately subject to tax, but Section 2872, supra, provides for the joint custody of the proprietor of the warehouse and a Government officer, called the 'storekeeper-gauger'.
>
> "Section 2873, as modified by Reorganization Plan No. 26 of 1950, prepared by the President

[28]The Court's attention is invited to the testimony of Del Tredici, who described the barreling and warehousing operation, R. pp. 209-220, 247-255.

of the United States pursuant to the provisions of the Reorganization Act[8] of 1949, provides that 'The establishment, construction, maintenance, and supervision of internal revenue bonded warehouses shall be under such regulations' as the Secretary of the Treasury shall prescribe.

"Section 2879(a) requires that distillers of all spirits removed to an Internal Revenue Bonded Warehouse shall enter the same for deposit in such warehouse, under such regulations as the Secretary of the Treasury[9] shall prescribe.

"Section 2915 contains detailed instructions regarding the keeping of the storekeeper-gauger's warehouse book.

"Referring to the Government's heavy hand upon distilleries, in Taney v. Penn National Bank of Reading, 3 Cir., 187 F. 689, 697, 698, 699, 700, 703 (1911), the Court said:

> "'The tax on whisky is remarkable and distinguished from other excise taxes, by the fact that it is in amount many times the cost of the whisky itself, the tax of $1.25 a gallon being about five times the ordinary value of the whisky at the still.[10] It is manifest that this extraordinary tax could not be collected on the whisky as it comes from the still, or when it is first put in barrels, without hardship to the distiller or owner so great as to discourage its manufacture or confine such manufacture to persons or corporations of great wealth. It was

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"[8]See note under 5 USCA section 241, Cumulative Supp. (1950).
[9]See note 8, supra.
[10]Under a 1951 amendment to 26 USCA section 2800(a)(1), the tax was $10.50 on each proof gallon."

necessary, or at least very desirable in the interest of the public revenue, that reasonable opportunity should be given to the distiller, to allow the product of his distillery to become marketable by the ripening process alluded to, before he was called upon to pay the tax * * *

* * * * * * *

"'* * * the warehouse is theoretically in the joint custody of the store-keeper and proprietor, but, in fact, the control of the storekeeper is complete and practically exclusive. The lock is put on by the government and the key is in the storekeeper's possession. * * *

* * * * * * *

"'To all the world, but especially to those engaged in the business of distilling and of buying and selling whisky, it was apparent that the physical custody and control of the whisky here in question was not in the distiller and vendor, but in the revenue officers of the United States, and in neither case was the distiller capable of making physical delivery to his pledgee or vendee. All those doing business with these distillers, including creditors, were bound to take notice of this notorious physical fact and were put upon due inquiry, and had imposed upon them the duty of self-protection, as to the title of the goods so situated * * *

* * * * * * *

"'*The physical possession was not transferred, because it was out of the power of the vendor to transfer the same,* without the payment of a tax many times the value of the goods sold, one of the very objects of the law

providing for the government's custody of the whisky presumably being that the payment of the tax might be deferred for a number of years without interfering with the right to transfer the property therein * * *

* * * * * * *

" 'As the reason for the rule making fraudulent, as against creditors, transfers of personal property, unaccompanied by actual delivery, is based upon the policy of preventing the fictitious credit permitted by allowing possession to remain in the debtor, it is pertinent to remark, in regard to a situation which, under the laws of the United States is, as we have said, sui generis, that, as the creditors of the Distilling Company had no access to the interior of the warehouse, they could not claim to have been misled to their injury. They cannot be deemed to have given credit upon the faith of whisky in a warehouse of which they had no means of ascertaining the contents.'

"The Taney case, supra, was affirmed by the Supreme Court at 232 U.S. 174 (1914).

"In an effort to distinguish the Taney decision on the facts, the Trustee and the Bank repeatedly point out that 'other warehouses were so close to Hedgeside that whiskey and spirits could be stored elsewhere within 72 hours, so that tax payments could be avoided', while that was not true in Taney.

"Precisely such an argument, however, was repudiated in the Supreme Court's Taney decision. Mr. Justice (later Chief Justice) Hughes said, at pages 185-186 of his opinion:

" 'It is said that the distiller need not use his own warehouse, but may place the goods in one of the general bonded warehouses established under the act of 1894 (28 Stat. at L. 564, 565, chap. 349). The appellee asserts that this would be impracticable; that no general bonded warehouse had been established in the collection district in question; that there are only twelve in the entire country, with a capacity that is extremely small in comparison with the output of the distilleries. *But, aside from this, the distillery warehouse is equally recognized by law; it is a "bonded warehouse of the United States". If it is a fit place for storage, the distiller is not obliged to remove the spirits elsewhere.* * * *

" 'The fundamental objection is that the custom, to which the entire trade is adjusted, is opposed to public policy. But we know of no ground for thus condemning honest transactions which grow out of the recognized necessities of a lawful business. The case is not one where credit may be assumed to be given upon the faith of the ostensible ownership of goods in the debtor's possession. Every one dealing with distillers is familiar with the established practice in accordance with which spirits are held in store, under governmental control, and are transferred by the delivery of such documents as we have here.' (Emphasis supplied.)

"The Bank and the Trustee insist that the Taney case can be distinguished on the ground that California law is different from Pennsylvania, and that the Supreme Court decided the

case 'under Pennsylvania law.' In the excerpt just quoted, however, Mr. Justice Hughes was expounding, not state law, but a Federal statute relating to 'a bonded warehouse of the United States'.

"Similarly, in Marchants' National Bank of Baltimore v. Roxbury Distilling Company, DC Md., 196 F. 76, 101 (1912), the Court discounted the effect of the local law upon the problem now being discussed:

> " 'But independent of the special enactment of Maryland with regard to distillery warehouses, I am in full accord with the special master in his conclusion that, *because of the peculiar situation of the distilled spirits stored in a bonded distillery warehouse,* there is by the transfer effected by the warehouse certificate as full a delivery of the goods as is commercially possible *under the special circumstances attending distilled spirits stored in the bonded distillery warehouses of the United* States.' (Emphasis supplied)[11]."

In the cases cited in the opinion of the District Court, Pennsylvania, Kentucky, and Maryland all have a Bulk Sales Law similar to California's Civil Code, Sec. 3440. In each case it was held that *the requirement of change of possession* (the only portion

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"[11]See also Bache v. Hinde, 6 Cir., 6 F 2d 508, 510, note 3 (1925), certiorari denied, 269 U.S. 581 (1925); Brown v. Cummins Dist. Corp., DC Ky., 53 F Supp 659, 664 (1944); Wells Fargo Nev. Nat'l Bank of S.F. v. Haslett Warehouse Company, 60 Cal. App. 225, 228-229 (1922), petition for hearing in the State Supreme Court denied (1923); Lederer v. Railway Terminal & Warehouse Co., Ill., 178 N.E. 394, 396 (1931)."

of Sec. 3440 involved here) was satisfied by a transfer into bond. In each case the decision depended upon *Federal statutes* relating to Internal Revenue Warehouses, not upon "local" statutes. These Federal statutes apply to a California distillery quite as much as to a Kentucky distillery.[29]

Appellants rely on *Stewart v. Scannell,* 8 Cal. 81 (1857). The case was decided *years before passage of the Internal Revenue Code,* which established the heavy Federal taxes and requirements for Internal Revenue Bonded Warehouses. In 1857 there were no I.R.B.W.'s and no tight Federal control of the distillery business.

The only other California case cited by appellants involving alcoholic spirits is *Guthrie v. Carney,* 19 Cal. App. 144, involving tax-paid wines and liquors in barrels and bottles. The case *did not* involve a transfer into an I.R.B.W., nor did it discuss the problem.

Appellants also cite two California cases on the "joint custody" point, one involving partnership property, the other property held in common. (App.'s Brief, p. 28.) Obviously a transfer from one partner to another, or one tenant in common to another, is no transfer at all. That is a different case from a transfer into a bonded warehouse, padlocked by a U. S. Government employee. The California Court in *Wells Fargo Bank v. Haslett W. Co.,* 60 Cal. App. 225,

[29]Since California has had but one or two distilleries, whereas Kentucky, Pennsylvania and Maryland have many, it is only natural that this phase of the law should develop in those whiskey-producing states.

pointed out that where goods are stored in a U. S. bonded warehouse, that fact is notice of the control of the United States with respect to their release.

In one breath appellants argue that no "exception" has been written into Sec. 3440 in the case of whiskey and spirits although it has in the case of brandy, and therefore the legislature did not intend to except whiskey and spirits.[30] In the next breath appellants cite other instances where *no statutory exception* has been made, but by *case law* a delay in transferring possession is excused "when immediate delivery is well-nigh impossible" (App.'s Brief, p. 29). In each insistance the exception has been in effect for many years without visible effect upon the legislature or the statute.

While so conceding that there are exceptions to Sec. 3440 (or instances wherein its requirements are *satisfied)* which are *not contained in the statute,* appellants insist that the delay in Schenley's withdrawal of the goods "has continued for too long a time", citing a case involving a transfer of hay. (App.'s Brief, p. 30.) "Since it was feasible to make partial withdrawals, it was equally feasible to withdraw the whole", assert appellants. Entirely feasible, *except for the payment of the heavy tax which put the spirits in the warehouse in the first place.*[31] The question is not whether

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[30]With one, or possibly two distilleries in the whole State, it seems likely that the California legislature had no intention either way—it simply did not consider the point.

[31]A tax of $10.50 per gallon times 55 gallons per barrel times approximately 8,933 barrels in all.

it was feasible for Schenley to withdraw, but *whether Schenley was required to do so.*

Finally, as was pointed out by the Supreme Court in the *Taney* case, there is no room for the argument that creditors are misled because of storage in an I.R.B.W. Appellants' closing argument on the point (Brief, p. 33) would lead the Court to believe that such is the case here. But a review of the Findings and the opinion of the District Court reveals that appellant bank lost most of its money taking warehouse receipts for goods which the *bankrupt* did not produce or own at any time, but which had been transferred into the bankrupt's warehouse as *bailee for the owner.*[32] Appellant bank lost its money because of the criminal acts of a dishonest warehouseman who forged duplicate warehouse receipts, a crime for which Stone served a prison term. The only misleading in this case was an outright criminal act.[33]

Independently of the Uniform Warehouse Receipts Act, it is settled law that a transfer into bond satisfies the change of possession required by the Bulk Sales Law.

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[32]See R. pp. 84-91, 100-105. The 2,759 barrels of whiskey, as against 574 barrels of spirits, were sold by Franciscan and transferred to the Hedgeside warehouse, where Stone forged warehouse receipts, as the owner of the whiskey, and pledged them to the bank without the knowledge of the true owners.

[33]It should also be noted that whereas now dire results are predicted by appellants, should these warehouse receipts be recognized, appellant bank, as well as Bank of America, American Trust Company, Schenley, and a score of other firms found no difficulty in recognizing them for years, until Stone forged worthless receipts. These dire predictions have the color of afterthoughts.

IV.

CONCLUSION.

The Referee and the District Court concluded on two separate and independent grounds that Schenley was entitled to the goods it had purchased.

First, Hedgeside was a warehouseman under the Uniform Warehouse Receipts Act, which repealed Sec. 3440 in so far as it applied to warehoused goods. Where appellants' arguments are factual, they are contrary to the Findings of Fact of the trial Courts and contrary to the overwhelming weight of the evidence. Where appellants' arguments are legal, they are contrary to the cases interpreting the Uniform Act, and appellants have themselves cited no case or other authority which supports their own strained interpretation. Schenley's warehouse receipts are regular and valid on their face, and appellants have shown no defect in them.

Second, these spirits were transferred into bond in an Internal Revenue Bonded Warehouse at the time of sale. All the cases on the point hold that such a transfer into bond satisfied the requirements of the Bulk Sales Law.

Schenley was an innocent purchaser for value. The goods were purchased in good faith and the purchase price paid to the owners of the goods. No valid reason has been advanced to avoid the effect of those purchases. No good reason has been advanced to justify turning over Schenley's goods to creditors of Hedgeside.

It is submitted that the order of the District Court, granting the petition in reclamation, should be affirmed.

Dated, San Francisco, California,
September 11, 1953.

Respectfully submitted,
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